No. 98-6 (4)

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In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, a Delaware Corporation; CYPRUS FOOTE MINERAL COMPANY, a Pennsylvania Corporation; and CYPRUS AMAX MINERALS COMPANY, a Delaware Corporation,

Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; and ZONNIE MARIE DANDY RICHARDS, Individually and as Representative of the Estate of Harold J. Richards, Sr.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF REVERSAL

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INTEREST OF THE AMICUS CURIAE[1]

The Interstate Natural Gas Association of America ("INGAA") is a non-profit association primarily of interstate natural gas transmission companies regulated by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act ("NGA").[2] Most of its members are natural gas companies that operate under and subject to the comprehensive federal regulatory scheme provided by the NGA and the FERC regulations promulgated thereunder.[3] These member pipelines have facilities throughout the United States and conduct operations under certificates of public convenience and necessity issued by the FERC and its predecessor, the Federal Power Commission ("FPC"), pursuant to § 7 of the NGA. These companies operate approximately 200,000 miles of natural gas pipelines in the United States and account for more than 90% of all natural gas transported and sold in interstate commerce.

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than INGAA and its members assisted financially in the preparation and submission of the brief. Petitioner El Paso Natural Gas Company is a member of INGAA in its capacity as a natural gas company, but not as to the uranium mining activities that form the basis for Respondents' claims on the merits. El Paso Natural Gas Company did not assist financially in the preparation or submission of the brief.

[2] 15 U.S.C. § 717 et seq. (1994).

[3] INGAA's members include thirty U.S. interstate pipelines, six Canadian interprovincial pipelines, and thirteen international pipeline companies.

There are more than 55 million acres of Indian land in the United States.[4] As a matter of geographical imperative, many interstate gas pipelines are required to cross Indian land in providing the interstate service authorized and approved by the FERC and the FPC. As a consequence of this proximity, controversies may arise between the pipeline companies and the various Indian tribes or their members. Accordingly, issues of federal Indian law – and particularly those relating to the jurisdictional authority of Indian tribes vis-a-vis non-Indians – are important to INGAA.

The decision by the Ninth Circuit below mandates deferral to tribal court authority and does so despite the fact that Congress has expressly decided that the claims arise under federal law only. The NGA, like the Price Anderson Act involved in this case, is broadly preemptive and interposes a uniform federal regulatory scheme.[5] Although many controversies involving INGAA's member pipelines are expressly subject to exclusive federal court jurisdiction under § 22 of the NGA,[6] other disputes arising from pipeline operations or the presence of facilities and personnel within Indian reservations and other Indian lands can implicate issues beyond § 22. As to those disputes, the Ninth Circuit's decision is potentially troublesome.

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[4] *See* Annual Report of Indian Lands, BIA web site (http://www.doi.gov/bia/realty/consol.html).

[5] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

[6] 15 U.S.C. § 717u (1994).

INGAA's interest is in ensuring immediate access to federal court for its pipeline company members and in preserving preemption concepts with respect to the NGA as well as the areas of "exclusive jurisdiction" identified in § 22 of the NGA. The decision below is regarded as significant to its member pipelines, and INGAA urges reversal.

SUMMARY OF ARGUMENT

This case provides the opportunity not only to clarify, but to correct this Court's decisions in *National Farmers Union*[7] and *Iowa Mutual*.[8] The Ninth Circuit read those decisions to require non-tribal members to incur the expense and delay associated with tribal exhaustion unless there was an "express jurisdictional prohibition" against tribal court jurisdiction.[9] It seems clear, especially in view of this Court's recent decision in *Strate*,[10] that a rule that is "prudential" is not so rigid and unyielding as the Ninth Circuit believed.[11]

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[7] *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

[8] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

[9] 136 F.3d 610, 617.

[10] *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[11] The Tenth Circuit appears to interpret *National Farmers Union* and *Iowa Mutual* in the same manner as does the Ninth Circuit. *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998). These two circuits account for most of the Indian law cases in the federal court system.

It appears to INGAA that the essential question is which forum – federal court or tribal court – should as a matter of common sense and reasonable respect to tribal authority decide in the first instance whether the tribal court has jurisdiction over non-tribal members. Because that question is strictly one of federal law and not tribal law, INGAA submits that federal courts are best equipped to decide that question.

Additionally, where federal preemption exists with respect to state regulatory authority, preemption must likewise exist with respect to tribal regulatory authority. Because, as *Strate* teaches, tribal court jurisdiction is confined by the extent of tribal regulatory jurisdiction and because preemption is exclusively an issue of federal law, such matters should be addressed by the federal courts. In preemption situations, it seems "plain" as this court said in *Strate*, that federal law supplants both state and tribal law so that no preliminary referral to tribal courts should be required. It would be difficult to envision congressional intent to *exclude* the states but *include* the tribes. This Court would not refer federal preemption issues to the state courts. Nor is any jurisprudential purpose served by referring such matters to tribal courts. To the extent that Indian tribes wish to advance their views, intervention or the submission of *amicus curiae* briefs by the Indian tribes or by the United States is an available vehicle to have those views presented and addressed.

ARGUMENT

Petitioners argued below that the claims asserted by Respondents in tribal court were preempted by federal law under the Price-Anderson Acts and, therefore, that the tribal court lacked jurisdiction. The Ninth Circuit did not decide the preemption issue. Instead, the court held that, under the tribal exhaustion doctrine of *National Farmers Union* and *Iowa Mutual*, challenges to tribal court jurisdiction must initially be decided in tribal court. Accordingly, Petitioners were left to take up their arguments regarding jurisdiction and preemption in tribal court.

INGAA submits that the Ninth Circuit's decision should be reversed. First, to the extent *National Farmers Union* and *Iowa Mutual* require that challenges to tribal court jurisdiction be initially resolved in tribal court, those decisions should be overruled. Such jurisdictional challenges should be decided in federal court at the outset, without any requirement of tribal exhaustion. Second, even if *National Farmers Union* and *Iowa Mutual* are not overruled, this Court's decision in *Strate* teaches that, in the circumstances present here, the tribal exhaustion doctrine does not apply. The courts below should have reached the preemption issue and should not have required exhaustion of tribal court remedies.

I. *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* SHOULD BE OVERRULED TO THE EXTENT THAT THEY REQUIRE A CHALLENGE TO TRIBAL COURT JURISDICTION TO BE DECIDED IN THE FIRST INSTANCE BY TRIBAL COURTS

The tribal exhaustion doctrine, to state it simply, holds that a challenge to tribal court jurisdiction over non-Indians (or other non-tribal members) should, in the ordinary case, be heard in the first instance by the tribal court. The effect of the doctrine is that federal courts, having undoubted jurisdiction over that challenge, must forego (or at least postpone) the exercise of that jurisdiction, and this despite their "virtually unflagging obligation to exercise the jurisdiction given them." *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

INGAA respectfully submits that federal courts are better able to decide this federal question[12] than are the tribal courts; that challenges to tribal court jurisdiction should be decided in federal court without prior deferral to tribal court. There are approximately 550 Indian tribes, including Alaska villages, recognized by the Bureau of Indian Affairs ("BIA").[13] Their associated reservation

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[12] *See National Farmers Union*, 471 U.S. at 852 ("the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law").

[13] *See* BIA web site (http://www.doi.gov/bia/tribes/telist97.html).

holdings vary in size from less than 100 acres to more than 16 million acres in the case of the Navajo Nation. While no officially-published information exists in the BIA, responses to informal inquiries to the BIA indicate that there are more than 150 tribal court systems of varying formality and cultural attributes.[14] With the great number of tribes and tribal court systems, it cannot reasonably be assumed that the tribal court systems will develop a uniform set of decisions on tribal court jurisdiction to assist the federal courts. *Cf. National Farmers Union*, 471 U.S. at 857.[15]

It may be accepted that, of the various Indian tribes, the Navajo Nation has a court system most like the federal system. However, the policy language of *National Farmers Union* and *Iowa Mutual* makes no distinction among tribal court systems, nor would distinctions be consistent with the stated rationale of advancing tribal self-government and self-determination. Even under the most sophisticated tribal court system, however, it would not be possible to say with any reasonable assurance that the tribal court, or indeed any other court, can better interpret this Court's controlling decisions on tribal court

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[14] In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978), the Court referred to the fact that there were then 127 tribal court systems of varying types.

[15] *See National Farmers Union*, 471 U.S. at 855-56 ("the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties, and administrative or judicial decisions").

jurisdiction than can a federal court. Under these circumstances, the question of tribal court jurisdiction over non-tribal members should not *per se* be remitted to tribal courts.

The jurisdiction question is not one in which the Indian tribes and their courts can be said to be free from interest. The scope of tribal court jurisdiction over non-tribal members is inextricably linked to notions of tribal sovereignty, and the tribes are understandably not disinterested in that regard. Accordingly, in deciding this jurisdiction question, INGAA suggests that it is more appropriate for the tribes to assume a position of advocacy – and thus inform the debate in that role – than to function in the role of a deliberative judicial body.

To a great degree, the explanations proffered for the tribal exhaustion doctrine seem to beg the jurisdictional question. For example, *Iowa Mutual* suggests that exhaustion avoids "infring[ing] upon tribal law-making authority," reasoning that "tribal courts are best qualified to interpret and apply tribal law." 480 U.S. at 16. But the challenge to tribal court jurisdiction implicates a question of federal law; it does not involve the interpretation or application of tribal law. *National Farmers Union*, 471 U.S. at 852. Federal judges, as compared to their tribal court counterparts, are better able to interpret and apply this Court's controlling decisions in *Strate*, *Montana*,[16] *Oliphant*,[17] *National Farmers Union*, *Iowa Mutual*, and the

[16] *Montana v. United States*, 450 U.S. 544 (1981).

[17] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

like. Because the issue to be decided is one of federal law, not tribal law, a federal forum is appropriate.[18]

Iowa Mutual also suggests that the failure to defer to tribal courts would place federal courts "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." 480 U.S. at 16.[19] This also sidesteps the essential inquiry. Whether the matter at issue is a "reservation affair" and one over which the tribe has "authority" is the very jurisdictional question that has yet to be answered. And, placing that federal question in federal court does not create competition – the federal court inquiry focuses on the jurisdictional question, and matters determined to be within tribal court jurisdiction would go forward in tribal court.[20]

[18] *Cf. Moses H. Cone*, 460 U.S. at 23 (the fact that federal law provides the rule of decision should be a factor in considering *Colorado River* abstention).

[19] *Iowa Mutual* relied in part on supposed protections accorded non-Indians under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1994). 480 U.S. at 19. However, the Navajo Supreme Court has declined to apply the ICRA as being of suspect constitutionality. *See Rough Rock Community School (Rough Rock School Board, Inc.) v. Navajo Nation*, No. SC-CV-06-94; March 14, 1996) ("We reject the Petitioners' suggestion that we apply the [ICRA] to this issue. It is likely that the Act is unconstitutional under *United States v. Lopez*").

[20] The Ninth Circuit interprets *National Farmers Union* and *Iowa Mutual* as requiring dismissal or abstention even though there is no pending proceeding in tribal court. *See, e.g., Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) ("Whether proceedings are actually pending in the appropriate tribal court is irrelevant."), *cert. denied*, 502 U.S. 1096 (1992).

The support of "tribal self-government and self determination" has been advanced as a rationale for the tribal exhaustion doctrine,[21] but determining the boundaries of tribal authority over non-Indians is a very different matter than – and appears to bear little relationship to – the exercise of tribal self-government and self-determination. *Strate* and *Montana* indicate that "a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459; *Montana*, 450 U.S. at 564. The exhaustion doctrine does not appear necessary to meet those objectives.

In dealing with the exhaustion concept first articulated in 1986 in *National Farmers Union*, the Court is not faced with a long history of decisions as it was in *Kiowa Tribe*,[22] which addressed concepts of tribal immunity, nor is it dealing with an issue, the elimination of which would be disruptive of settled expectations. Permitting the federal courts to decide federal questions regarding the extent of tribal court jurisdiction would not impair any process. Rather, it would eliminate the expense and delay associated with what is essentially an advisory opinion. To the extent the tribal court or the tribe is an interested party in the judicial determination (as opposed to a litigant who, for whatever reason, prefers tribal court jurisdiction) either can be permitted as a matter of right to intervene or to appear as *amicus curiae* to inform the

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[21] *Iowa Mutual*, 480 U.S. at 15-16; *National Farmers Union*, 471 U.S. at 856.

[22] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700, 1704-05 (1998).

federal court of the tribal interests, as distinguished from private interests, that are regarded as imperiled, as can the United States.[23]

It seems abundantly clear that the jurisdiction question should be decided initially and finally in federal court, which is the forum best-situated to resolve that issue. Accordingly, to the extent *National Farmers Union* and *Iowa Mutual* hold to the contrary, INGAA respectfully suggests that they be overruled.[24]

II. THE TRIBAL EXHAUSTION DOCTRINE DOES NOT APPLY TO FEDERAL PREEMPTION OR TO OTHER GATEKEEPING MATTERS NOT DEPENDENT ON TRIBAL LAW

Contrary to the approach taken below by the Ninth Circuit, the tribal exhaustion doctrine, as clarified by *Strate*, is not a rigid, unyielding doctrine. Rather, as indicated in *Strate*, in appropriate circumstances, federal courts should resolve the challenge to tribal jurisdiction in the first instance, without requiring exhaustion of tribal remedies. INGAA submits that this is such a case.

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[23] *See, e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503 (11th Cir. 1993).

[24] Apart from the confusion in the courts, *National Farmers Union* and *Iowa Mutual* have spawned a multitude of articles and commentaries with varying conclusions and recommendations. *See, e.g.*, Laurie Reynolds: *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. Rev. 1089 (1995); Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 Marq. L. Rev. 531 (1997). It is better that this gordian knot be cut.

Strate decided two important questions – one dealing with the scope of tribal adjudicatory jurisdiction; the other dealing with the tribal exhaustion doctrine. Both are important in this case. With regard to the jurisdiction issue, *Strate* held that the adjudicatory jurisdiction of tribal courts is limited by the legislative/regulatory jurisdiction of the tribe; that is, if a tribe's legislative/regulatory power does not extend to a matter, the tribal courts cannot adjudicate with respect to that matter either. "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453.

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes.

Id. at 459 n.14. The ruling that adjudicative jurisdiction cannot exceed regulatory jurisdiction is important here because of the preemption issue raised below. Preemption means that the tribes have no regulatory jurisdiction, and the absence of regulatory jurisdiction with respect to the issue means that tribal courts have no adjudicative jurisdiction on that issue.

Strate adopted a pragmatic approach to the tribal exhaustion doctrine and its exceptions. *Strate* teaches that, in some circumstances, the challenge to tribal court jurisdiction should be decided in the first instance in federal court without first taking up the jurisdictional challenge in tribal court. Specifically, the Court held that, when it is "plain" that the tribe lacks regulatory (and thus

adjudicative authority) over the dispute, the tribal exhaustion doctrine is not applicable.

> [W]hen tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

Id. at 459-60 n.14.

INGAA submits that the federal preemption question raised by Petitioners below is precisely the type of issue that, under *Strate*, must be decided in federal court and may not be sent to tribal court.[25] Because adjudicatory jurisdiction cannot exceed regulatory jurisdiction, Petitioners' argument that tribal regulation was preempted by federal law is a jurisdictional challenge that *Strate* held should be decided in federal court. It was thus contrary to *Strate* and error for the Ninth Circuit to conclude that the tribal exhaustion doctrine prevented it from taking up the preemption question.[26]

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[25] Preemption has been extensively litigated in federal court, and the case law and controlling principles are well-developed. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152-54 (1982).

[26] Considerations of judicial economy counsel that preemption be decided at the outset and not postponed until after the challenge to tribal jurisdiction is concluded. Addressing the preemption issue first may resolve the jurisdictional challenge, thus eliminating the need for a searching review of the various matters that comprise the inquiry into tribal jurisdiction. *See National Farmers Union*, 471 U.S. at 855-56.

Under *Strate*, jurisdiction and other key "gatekeeping" questions such as preemption may properly be addressed in federal court at the outset and need not be remitted to tribal court or postponed until after the tribal court has ruled on the challenges to its jurisdiction. When such issues are raised "the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay."

III. INDIAN TRIBES ARE NOT EXEMPT FROM IMPLICIT PREEMPTION BY COMPREHENSIVE FEDERAL REGULATORY ACTION

Respondents appear to suggest that tribal regulatory authority cannot be preempted by comprehensive federal regulatory action unless Congress explicitly so states.[27] The enormous mischief of such an argument is readily apparent. There are numerous substantive areas that are comprehensively preempted by federal regulation where the statutory language makes no express reference to Indian tribes.[28] One can envision the problems if Indian tribes were free to impose different rates, different conditions of service, or different safety standards, for example. It is inconceivable that Congress intended to permit the various tribes to intrude into areas where federal regulation prevents state intrusion.

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[27] *See* Respondents' Brief in Opposition to the Petition for Writ of Certiorari at 10-11.

[28] *See, e.g.*, the NGA; the Natural Gas Pipe Line Safety Act, 49 U.S.C. §§ 1671, 1672(a) (1994) (express preemption); the Food, Drug and Cosmetics Act (Medical Device Amendments), 21 U.S.C. § 360k(a) (1994) (express preemption).

The same considerations that give rise to preemption of state regulatory authority require preemption of tribal regulation as well. In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), speaking with respect to preemption under the NGA, the Court described those considerations as follows:

> The circumstances in which federal law pre-empts state regulation are familiar. A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal interest in the field precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or "where the object sought to be obtained by federal law and the character of the obligations imposed by it reveal the same purpose." Finally, even where Congress has ~~not entirely~~ displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

Id. at 299-300 (citations omitted). Nothing suggests that the preemptive force of these factors is any less potent in the context of regulation by Indian tribes, and, in fact, the contrary is the case. To hold otherwise would impair the

federal regulatory scheme and foster inconsistent regulatory requirements.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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